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sibility. The crude dilemma must disappear, the alternative be changed into alternation. And it is our duty to hasten this process, not to retard or to destroy it. The more quickly labor is converted into wealth and wealth reconverted into labor, the lighter will become the aggregate burden of human toil and the more nourishing will be the fruits of human leisure and refinement. We must, for the sake of truth and justice, seek the true "wealth equivalent" of human labor. But to attempt the final extinction of either alternative, or to despair of the eternal fitness of their alternation, would be presumptuous and unwise. We want neither the aimless toils of Sisyphus nor the lifeless rest of chaos, neither Hades nor Nirvana. We want Paradise. And the Paradise of rational men lies in their unceasing endeavors to regain it.

E. GRYZANOVSKI.

ART. IV. — THE LAW OF MARITIME WARFARE, AS IT AFFECTS
THE BELLIGERENTS.

THE recent Franco-Prussian war brought out into great and practical prominence two questions of international law, — the one concerning the proper methods of conducting maritime warfare by the belligerents, the other concerning the duties of neutral states. Immediately upon the outbreak of hostilities, in the summer of 1870, the king of Prussia issued a proclamation, declaring that no ships nor cargoes belonging to French subjects, except contraband, should be molested by his own cruisers, even though the French government should not reciprocate by a similar concession. France did not reciprocate. In the course of the contest, British subjects were engaged in an active commerce with the French in arms, ammunition, and other articles confessedly contraband, and in coals for the French navy, which no treaties and no modern writers have ever pronounced to be contraband. A correspondence thereupon took place between the British and Prussian Cabinets, somewhat acrimonious on the part of the latter. King William's Minister for Foreign Affairs announced and maintained the

novel doctrine that a neutral nation or its government is to be held responsible to one belligerent for the acts of its citizens and subjects in carrying on a contraband commerce with the other belligerent, and is justly liable to reclamations in favor of the former for this breach of international duty, and for the injuries caused by it. In other words, that the penalties for a commerce in contraband are to be visited upon a neutral state as well as upon its private citizens who engage in the traffic and assume its risks. These positions of the Berlin Cabinet received a considerable support in Europe from two classes of publicists, — from the *sentimentalists* and from the *absolutists*, or those whose opinions and writings tend to uphold absolutism in its most extreme form. They also met with much favor in the United States, and even obtained the extraordinary approval of Mr. Secretary Fish in an official communication to the Prussian Minister. The ordinary newspaper support which these propositions have received in this country, exhibiting as it did an utter ignorance of the principles and of the rules of international law, seems to have been suggested by a sentiment of blind antagonism to Great Britain and of equally blind admiration for the wonderful military organization and power of Prussia.

I purpose to investigate these proposed dogmas, and to subject them to a somewhat careful analysis. I shall show that they are opposed to the very sentiments of humanity which many of their advocates invoke in their support, and that, tending inevitably to uphold the strong against the weak, they are entirely in the interests of absolute power. In pursuing this design, I shall observe the following general order, and give, —

I. A very brief statement of the rules and methods of maritime warfare both as respects the belligerents and as respects neutrals, which are now accepted and acted upon by all the civilized nations of the world ;

II. An historical sketch of the origin and progress of the two doctrines under review, and particularly of the first and most important of them ;

III. A discussion of these doctrines.

I. I give, really as an introduction, a very brief statement

of the rules and methods of maritime warfare both as respects the belligerent parties themselves and as respects neutrals.

Any general discussion of the nature of international law in the abstract, any examination of the fundamental question whether it is in a true sense of the term *law*, or is only a collection of principles and formulas voluntarily assumed and complied with, having no true human sanction, will not now be attempted. It is enough for me to say at present that the practical rules for the conduct of maritime warfare in form, in precision, in certainty, and in compulsive force, approach more nearly than any other portions of the international system the commands of a purely municipal legislation; they have, more than any others, the character and effect of true and positive law enforced by human sanctions, judicially applied. The reason of this is obvious. The operations of maritime warfare, both as respects belligerents and neutrals, consist chiefly in the capture of ships and cargoes. These mere acts of manual taking do not work a change of property in the ship or cargo seized. By the universal consent and practice of civilized nations, the lawfulness and efficiency of the capture must be judicially determined. This is done by a judgment of a prize court in a proceeding *in rem* instituted by the captors, all the world having an opportunity of coming in and contesting. The decree of such a tribunal, and a public sale of the prize by virtue thereof, transfer the property in the article to the purchaser, and this property is recognized as valid all the world over, even in a neutral nation of which the original owner was a citizen. In fact, there is no higher and more complete title than that derived from a condemnation by a prize court and a sale in pursuance thereof. It is true that the prize court is always a tribunal of the belligerent making the capture; but this fact, though it has often given rise to theoretical discussions, has never in the slightest degree weakened the title derived from the proceedings. These prize courts are therefore the international tribunals, the only regular judicial tribunals which have any semblance of an international character. They proceed judicially; and they have announced and promulgated the rules which govern maritime warfare in the same manner and form in which the strictly national courts have announced and pro-

mulgated the rules which govern the internal affairs of a particular state. It has so happened that among the great maritime powers these prize courts have generally been composed of jurists and statesmen of the highest ability and character. In Great Britain the Court of Admiralty is always clothed with the prize jurisdiction in time of war, with an appeal to the Judicial Committee of the Privy Council. In the United States the Supreme Court is the prize tribunal of the last resort. In many and perhaps most of the European countries, prize courts are created by special commission at the outbreak of hostilities. The reason is obvious, then, why the rules of the international law relating to the conduct of maritime warfare, in a marked and special manner resemble, both in form and character, the rules of the municipal law ; they are the results of judicial decision, and not of diplomatic negotiation, and they have to do with the destruction and the creation of private rights of property in things transportable and constantly transported over the whole world, which rights are everywhere acknowledged and protected.

I come now to a concise statement of these rules : and *first*, as they affect neutrals ; and *second*, as they affect the belligerents.

First, as they affect neutrals.

These should be separated into two entirely distinct classes. Much confusion exists in the popular mind — which shows itself in the popular literature, in the newspapers and the magazines, and even in our American popular diplomatic writings, emanating from men who have been trained by no previous study or experience for diplomacy — from a failure to keep these two classes separate, from a tendency to combine them and to confound the rights and duties which belong to or flow from them respectively. These two classes of rules are, firstly, those which affect and have relation to a neutral nation in its organic capacity, and which are imposed upon and bind, so far as any international rules can bind, its government. It is plain that this class lies entirely outside of any judicial cognizance. The precepts themselves which it contains have only a moral sanction ; they are to be obeyed voluntarily, are to be made effective by negotiation, or are to be enforced by war. And,

secondly, those which affect and have relation to the citizens and subjects of neutral nations, in their rights of persons and property.

Firstly, a neutral nation in its organic capacity, and as represented by its government, may not aid either of the belligerents. This, of course, forbids all direct acts of the government in furnishing warlike materials, troops, subsidies, and the like. But it goes much further, and requires that the neutral government should use all reasonable diligence to suppress and prevent any aid by its subjects, or by agents of a belligerent, within its jurisdiction, when such *aid assumes the form and character of a military array*.

I have endeavored here to generalize this important principle into a short and comprehensive formula, and to express, in the language I have used, at once the reasons and the limitations of the positive rule. I think I have done so when I affirm the neutral state's duty to be to use all reasonable diligence to suppress and prevent aid to one belligerent, where such aid assumes the form and character of a military array. This, evidently, includes the fitting out and setting forth of organized expeditions from neutral soil against one belligerent in aid of the other; it also embraces the enlistment of soldiers or sailors within the neutral territory by agents of a belligerent, even though the persons enlisted should depart singly and unarmed, because by such a proceeding the belligerent potentially extends its military organization or array within the neutral jurisdiction; it also prohibits the fitting out or despatching of armed vessels for the purpose of cruising against one of the combatants, in the service of the other; because such a man-of-war is as much a military array as is an army. I need not illustrate further. But, on the other hand, this doctrine does not make the neutral nation or government responsible for the unorganized and voluntary departure of its subjects to join the forces of a belligerent, nor for the commercial enterprises of its citizens in selling or transporting contraband articles to a belligerent government or its subjects, or in evading a blockade, or even in fitting out and despatching under the neutral flag an armed vessel, all ready for war, if the object be to transport the vessel to a belligerent port, and there to sell her as a business venture.

The recent British Neutrality Act, so far as it forbids the queen's subjects from joining the forces of a belligerent as stated above, and from selling an armed vessel as last described, goes beyond the requirements of the international law. The United States Neutrality Act contains no such provisions.

Secondly, rules which affect and have relation to neutral subjects and citizens.

Neutral subjects may freely and without any risk carry their own goods in their own vessels to all the ports of a belligerent which are open, — that is, not blockaded by the other party, — provided that the goods are not contraband ; subject to the liability of the vessel's being searched on the high seas by the cruisers of the other party to ascertain if there are contraband goods on board, and subject also to the risk and penalty incident to contraband commerce.

It is generally said that commerce in contraband is illegal. This is, as it seems to me, a very inaccurate way of stating the doctrine ; and the use of the word “ illegal ” has done much to create the confusion of ideas which so generally exists in reference to this subject. It is more accurate to say, that if a neutral transports to a belligerent articles contraband of war, he does so under the risk and penalty of having the ship seized, the voyage broken up, and the prohibited goods condemned by decree of a prize court. Perhaps the whole cargo might, under some circumstances, be confiscated ; but it is not now the practice to condemn the vessel if her destination be to an open port. If the neutral adventurer evades the hostile cruisers, and gets his contraband to its intended purchaser, all risk and liability are ended. He is in no way responsible for that act, even though he should be overhauled on the return or another voyage ; and this simple fact shows, conclusively, that his proceeding is not, in any true sense of the term, *illegal*.

When an effective blockade of a port has been established, it is commonly said that all neutral trade with the place is illegal. The same criticism is to be made here as in the last case. It is more accurate to say that a neutral voyage to a blockaded port is under this very serious risk, — the vessel and cargo may be captured by the cruisers of the blockading party, and will be entirely confiscated by decree of a prize court, ship and

lading, without reference to the nature of the goods. This risk lasts from the beginning of the outward voyage to the end of the return voyage, because coming out of the blockaded port is as much prohibited as going into it. But if the return voyage be completed in safety, all liability for the adventure is ended, even though the ship should afterwards be taken.

A long controversy was settled — or is supposed to have been settled — by the Treaty of Paris of 1856, between all the great powers of Europe. A declaration of principles annexed to this treaty contains four rules of maritime warfare, of which the second and third are as follows: “The neutral flag covers enemy goods, except contraband of war. Neutral goods, except contraband of war, are not seizable under the enemy flag.” To this declaration almost all civilized nations have given their formal adherence. The result is, that a neutral vessel may transport goods owned by enemy subjects from all parts of the world to open ports of the same enemy, and to all parts of the world from open ports of that enemy, and between all ports not enemy, without molestation, unless the goods are contraband, in which case they would be liable to confiscation. And conversely, an enemy ship may transport neutral goods from and to the same places, and the goods would not be subject to confiscation, unless they were contraband, although the ship would be, as we shall see under the next head. These rules do not of course in any way affect or interfere with the hostile rights of blockades.

Second, the rules as they affect the belligerents, including citizens and subjects thereof.

Of course armed ships of war are liable to be captured, and thus to become the property of the victor nation. I put out of view the subject of privateering, because this method of conducting maritime warfare has happily been very generally if not universally abandoned. The ships of commerce of private citizens or subjects of one belligerent, together with the cargoes therein belonging to citizens or subjects of the same state, may be captured anywhere on the high seas, no matter where bound, by the cruisers of the enemy, and may be condemned by its prize courts. Under the rules established in 1856, the goods of a belligerent citizen not contraband, on board a

neutral vessel not running a blockade, and the goods of a neutral not contraband on board the vessel of a belligerent not running a blockade, are free from capture.

It is proposed to change two of the foregoing rules, and to make belligerent commerce, except in contraband, absolutely free, and to impose upon neutral nations the active duty of restraining the contraband commerce of their private citizens and subjects. This brings me to the second general head, namely, an historical sketch of the origin and progress of these new doctrines, which are proposed for acceptance to the family of nations.

II. The Abbé Mably was the first publicist who announced and advocated the dogma that private commerce by enemy subjects, except in contraband, should not be interrupted by the war. He does not discuss the proposition at any length, but in a chapter treating of commerce as a source of national wealth and power he says : —

“Why should two nations, when war is declared between them, at once interdict all reciprocal commerce? This usage is a relic of our ancient barbarism.”

He adds some other remarks of the same import, but confounds the reform he suggests with the further proposal to abolish privateering, so that it is difficult to make out clearly whether he would have private enemy commerce free altogether or free only from capture by corsairs.*

In 1782 Galiani, a Neapolitan ecclesiastic and publicist, followed the Abbé Mably in his criticisms upon the existing international law. In his treatise, *De' Doveri de' Principi Neutrali*, there is a chapter upon privateering. Amidst a violent onslaught upon the custom of nations to use privateering, he says : —

“Then, when the war shall advance towards its close, we shall see on the one side a conquering general make his triumphal entry into a conquered place, amidst the acclamations of the inhabitants whose persons and privileges he has spared, whose magistrates he has maintained in the exercise of their functions, and whose goods, merchandise, and warehouses he has protected ; while at the same moment other goods

* *Le Droit Public de l'Europe fondé sur les Traités*, 3^e ed. 1764, Tom. II. p. 468 *et seq.*

of the same nature, depending upon the same commerce, deposited a little time before in the same warehouses, but embarked during the war upon ships to become the object of an inoffensive and loyal traffic, shall be declared good prize and condemned as booty of war to the captors. O atrocious and mournful contrast ! ”

After this parenthetical picture he immediately returns to his attack upon privateering.* I think we are to infer from the context that Galiani does not object to the capture of private property by men-of-war, but only to its capture by corsairs. M. Cauchy, one of the ablest modern French advocates of the new doctrine, recognizes this fact, but gives it an ingenious and hardly honest turn by declaring that the abolition of privateering and the absolute freedom of belligerent commerce are so intimately bound up with each other, that the one necessarily implies the other, and that the writers referred to, while urging the abolition of corsairs, were in reality advocating its corollary, the absolute freedom of commerce.†

Thus far we have only the speculations of theoretical writers. But in 1785 the doctrine was incorporated into a treaty made by two persons who are not ordinarily looked upon as sentimentalists, although they may have been philosophers,—Frederick the Great and Franklin. The first treaty between Prussia and the United States, concluded in that year, contained the following stipulation : —

“ Article XXIII. If war should arise between the contracting parties, all women and children, scholars of every faculty, cultivators of the earth, artisans, manufacturers, fishermen, unarmed inhabitants of unfortified towns, villages, or places, and in general all others whose occupations are for the common subsistence and benefit of mankind, shall be allowed to continue their respective employments, and shall not be molested in their persons, nor shall their houses or goods be burned or otherwise destroyed, nor their fields wasted by the armed force of the enemy into whose power by the events of the war they may happen to fall ; but if anything is necessary to be taken from them for the use of such armed force, the same shall be paid for at a reasonable price. And all merchant and trading vessels employed in exchanging the products of different places, and thereby rendering the necessary comforts and

* *Le Droit Maritime International*, par Eugène Cauchy, Tom. II. p. 285, where the whole passage from Galiani is quoted.

† *Droit Maritime International*, Tom. II. p. 474.

conveniences of human life more easy to be obtained and more general, shall be allowed to pass free and unmolested ; and neither of the contracting parties shall grant or issue any commission to any private armed vessels empowering them to take or destroy such trading vessels or interrupt such commerce."

From the time of this treaty the theory I am examining has generally, though of course improperly, been called the "American doctrine." One most important and significant fact should be carefully noticed in this connection. Franklin and his colleagues were charged by the United States with the duty of entering into treaties with several other European powers besides Prussia. He took part in negotiating the treaty of 1778 with France ; he concluded that of 1783 with Sweden ; John Adams alone signed that of 1782 with the Low Countries. Not one of these contains any stipulation similar to the twenty-third article of the treaty with Prussia ; not one makes the least allusion, however distant, to the doctrine which is said to be distinctively American.

"There is nothing in the diplomatic correspondence of the period which makes it appear that it was ever made a question of imposing on, or of demanding from, any other nation than Prussia respect for the private property of enemy subjects. The notion is only found incorporated in a convention between the United States and Prussia, between an exclusively maritime state of North America and an exclusively continental power of the North of Europe whose marine was at the time almost nothing ; that is to say, between two peoples who were in the quasi-impossibility of making war upon the land, and who could by no possibility encounter each other on the sea." *

This treaty expired by its own limitation in 1796. Negotiations for a new convention were opened in 1798. John Quincy Adams, Minister Plenipotentiary of the United States, in his first communication to the Prussian Cabinet suggesting changes to be made in the old treaty, wrote :—

"It is proposed to omit the last clauses of the twenty-third article, which declare that, in case of war between the high contracting parties, the merchant and trading vessels shall not be subject to capture. This stipulation being of little importance to the high contracting parties,

* Hautefeuille, *Questions de Droit Maritime International*, 1868, p. 71.

between whom no probability of war, no opposing interests which might lead to it, appear to exist, it is therefore in regard to other nations, who may require similar conditions when they might import very different consequences, that this engagement is desired to be omitted." *

The Prussian plenipotentiaries replied : —

"The twenty-third article, which protected merchant vessels from all capture, was dictated without doubt by the purest considerations of humanity and benevolence, and it is not without regret that we efface it ; but this pleasant (*douce*) theory being so difficult to carry into practice, it only remains to renounce it at once, especially since the political interests of the United States may possibly be affected by it." †

Thus, at the request of an American minister and in accordance with the public interest of the United States, this so-called American doctrine was politely but somewhat contemptuously dismissed from the Prussian Treaty.

In 1792 the French Legislative Assembly decreed the abolition, first, of the capture of private property on the sea ; and, second, of privateering. It invited the executive power to enter into a negotiation with all the maritime states of the world in order to induce them to recognize this double precept. The city of Hamburg alone replied favorably to the philosophic appeal. ‡ The philosophy was, however, very short lived, for during the wars which soon arose the French Republic openly violated all rules of international law, and outraged the rights of neutrals in a manner which no other civilized state has ever imitated.

At the commencement of the war with Spain, in 1823, a despatch of M. Chateaubriand announced that the French government would not issue any letter of marque, and would even order the royal navy to capture only the Spanish ships of war, and not to seize any vessel of commerce, Spanish or neutral, unless such vessel was endeavoring to force an effective blockade. § This was, however, a mere paper manifesto ; Spanish prizes were taken as usual. Although the philanthropic state paper of the French philosopher-statesman produced no

* J. Q. Adams to the Prussian Ministers, July 11, 1798, Am. St. Pap. For. Rel., fol. ed. Vol. II. p. 353.

† Prussian Ministers to J. Q. Adams, September 25, 1798, *Ib.* p. 254.

‡ Hautefeuille, *ubi supra*, p. 64.

§ Cauchy, *ubi supra*, Vol. II. p. 374.

direct and practical effect on the war, it kindled a responsive glow in the placid bosom of President Monroe. In his Annual Message to Congress, December 2, 1823, the President, speaking of this French declaration, said : —

“ This declaration, concurring with principles proclaimed and cherished by the United States from the first establishment of their independence, suggested the hope that the time had arrived when the proposal for adopting it as a permanent and invariable rule in all future maritime wars might meet the favorable consideration of the great European powers. Instructions have accordingly been given to our ministers with France, Russia, and Great Britain to make those proposals to their respective governments ; and when the friends of humanity reflect on the essential amelioration to the condition of the human race which would result from the abolition of private war on the sea, an earnest hope is indulged that these overtures will meet with an attention animated by the spirit in which they were made, and that they will ultimately be successful.”

In his next message, December 7, 1824, he returned to the subject, saying : —

“ Propositions having this object in view have been made to the governments of Great Britain, France, and Russia, and of other powers, which have been received in a friendly manner by all, but as yet no treaty has been formed with either for its accomplishment. The policy will, it is presumed, be persevered in, and in the hope that it may be successful.”

In pursuance with this policy the American ministers brought the matter before the French, British, and Russian Cabinets, and a polite correspondence followed. The American Minister at St. Petersburg, December 5, 1823, presented to the Russian government the *projet* of a convention, the fourth article of which was identical in terms with the twenty-third article of the Prussian Treaty of 1785. He addressed an explanatory note of the same date to Count Nesselrode, from which I take the substance of a few sentences which give the gist of his argument : —

“ The motive which impels the government of the United States to offer this proposition to the civilized world is that the same principles of justice, of charity, and of peace, under the influence of which Christian nations have with common accord exempted private property on land from the destruction and spoliation of war, equally demand protection for private property on the high seas.”

In answer to an assumed objection, that, if this doctrine should be established, neutrals would lose great commercial advantages which they now possess in war between maritime states, he says that the United States is the most important neutral power having an extensive commerce, and that its government is willing to surrender all such advantages, because the experience of the recent European wars had taught it that they do not exist. He concluded his note as follows : —

“The system which the United States now proposes is not new in their politics. It took its birth in the first years of their independence. The first treaty with Prussia is a proof of this.”

Count Nesselrode replied February 1, 1824, acknowledging the kindly disposition of his court in favor of an act which he said “would be a crown of glory for modern diplomacy,” but he was of opinion that “the proposed measures could only produce the effects which had been attributed to them by an agreement of all the other maritime powers.” So Mr. Monroe’s project came to nothing.

In 1856, at the close of the Crimean War, the great powers of Europe signed the Treaty of Paris, and annexed a declaration, the second and third clauses of which have already been quoted. The first and fourth were, “Privateering is abolished ; and blockades to be obligatory should be effective.” All the other nations of the world were invited to unite in this convention. The United States declined, unless a further provision were added, to the effect that “private property of the subjects or citizens of one belligerent power upon the high seas should not be seized by the armed vessels of the other power, unless it were contraband.” It is generally assumed that this single suggestion exhausted the amendments desired by the United States government, whereas the despatch of Mr. Marcy went much further, and proposed the removal of all restriction upon contraband, the surrender of the right of visit and search, and the complete liberty of neutral commerce excepting with blockaded places.* This attitude of the United States received a partial response from a few European states and peoples. A large assembly of merchants at Bremen, held December 2, 1859,

* Cauchy, Vol. II. pp. 376–380.

† Despatch of Secretary Marcy to the French government, July 28, 1856.

adopted the following statement of principles, which, as it is illustrative of the arguments generally put forth in favor of the new doctrine, I quote entire:—

“ Considering that respect for persons and for property is the only basis upon which the moral and intellectual relations of the people can prosper ; that without it morality and well-being cannot develop freely and without restraint ; that this sacred principle ought to be respected even in war by the nations which hold the honorable position of marching at the head of civilization : considering that, contrary to this principle, belligerents are still authorized, in maritime wars, to confiscate the goods of persons peaceably exercising their trade, to seize and destroy merchant ships and their cargoes, and to make the crews prisoners : considering, moreover, that public opinion universally pronounces against this iniquitous mode of procedure ; that the declaration of the Congress of Paris, of April 16, 1856, has opened the way to a new progress, and has been approved by the greater part of the nations ; that this declaration protects, not only the interests of those domiciled in neutral states, but guards also the goods of those domiciled in the belligerent states, when these goods are found on board a neutral ship ; that many states, and among others the United States of America, have formally expressed the desire that the inviolability of private property should be established : considering, also, that it belongs to the Congress of the great European powers, soon to reassemble, to finish the work of its predecessors by extirpating from the maritime law the arbitrary principles of the past, and by raising in this manner an imperishable monument in the annals of civilization : considering, finally, that it is a duty of all the friends of progress and of the development of humanity to elevate their voices in the counsels of their nation, and to make their governments the interpreters of the unanimous wishes of the civilized world, — this assembly decrees : 1. Public opinion imperiously demands that the inviolability of persons and of property should be extended, during maritime war, to those domiciled in the belligerent states.

“ 2. The senate of the free city of Bremen is prayed to make itself the representative of this principle, and to take, as well with the states of Germany as with the powers united in Congress, the necessary measures to procure the universal acknowledgment thereof.

“ 3. The members of this assembly, who have at heart the progress of right and of civilization, engage to use all their efforts with their respective governments to procure the universal acceptance of this principle.

"4. A committee shall be named to communicate these decisions to the senate of the city of Bremen, to the Chamber of Commerce, and to foreign consuls resident at Bremen."*

This production, which shows that the noble art of blather-skite is not confined to the United States, M. Bluntschli says, "formulates the true modern principle." In the same month a deputation of merchants presented a communication to the senate of Hamburg, and demanded the adoption of the following extraordinary propositions:—

"1. The freedom of private property on the seas from the attacks both of privateers and of men-of-war; 2. The restriction of blockade to fortified places, and that even there it should prevent only the introduction of contraband articles."

The latter rule would, in effect, be the abolition of blockade. The New York Chamber of Commerce of course could not refrain from giving to the world its utterance upon this subject; it formally requested President Buchanan to renew the proposition made through Mr. Secretary Marcy. The President replied by a letter, in which he left other innovators far in the background, for he advocated the abolition of all right of blockade in maritime warfare. This body of citizens, which represents commerce in name, has during the past year, under the leadership of that eminent publicist, George Opdyke, discussed and perhaps passed resolutions favoring the humanitarian reform.

In the war of 1866 Prussia and Austria renounced their right of capturing merchant ships. As neither nation was largely maritime, this action had little practical value.

Among the publicists of the present day Pinheiro-Ferreira, an annotator of Martens, and Pradier-Fodéré, the most recent editor of Grotius and of Vattel, are violent advocates of the new doctrine. One of the most exhaustive modern treatises upon maritime law is *Le Droit Commercial dans ses Rapports avec le Droit des Gens et le Droit Civil*, in four volumes, 1861, by M. G. Massé, Vice-President of the Tribunal de la Seine. M. Massé discusses this subject with much ability.† I shall have

* Bluntschli, *Droit Int. Codifié*, p. 339, note.

† See Vol. I. p. 104, n. 121 *et seq.*

occasion to refer to his argument in the sequel, because it presents the case in a calm and logical manner, and without the almost inevitable declamation in which other writers of the same school indulge. Another work to which I have already referred, *Le Droit Maritime International*, of Eugène Cauchy, 1862, two volumes, seems to have been written with express purpose of defending the proposed change in the law of war. The author closes his elaborate treatise with a formal argument and a reply to objections which he puts into the mouth of his opponents. As is often the case, however, in such controversies, he utterly fails to present the objections which have any force, and of course omits to answer them. M. Bluntschli, in his *Droit International Codifié*, article 665, states the rule in a manner which sufficiently indicates his personal opinions as well as his lack of candor and, I may even say, veracity: "Although maritime war should be directed against the state and not against individuals, and although by the natural law private property should be respected on the sea as well as on land, yet many maritime powers still recognize in maritime war the right of seizing ships which are the property of persons within the jurisdiction of the enemy country, and of confiscating the goods found on board such ships."

I shall make no reference to the standard writers upon international law, the great public jurists, from Grotius down to Wheaton and Phillimore and Twiss, because they all recognize and uphold the doctrine and practice which the modern theories would overthrow. But it is worthy of notice that Hautefeuille, the great champion of neutral rights and of free neutral commerce, and certainly one of the ablest publicists of the present day, is an ardent supporter of the old and established principle. His master work, *Droits et Devoirs des Nations Neutres*, sufficiently expresses his views; they are repeated at greater length in his *Histoire des Origines, des Progrès, et des Variations du Droit Maritime International*. Finally, in his latest work, *Questions de Droit Maritime International*, 1868, he devotes an essay to the examination of this question. From this essay I have drawn a few facts. The argumentative position is strong and convincing; but, for the patriotic and loyal American, its force would doubtless be somewhat impaired by

the spirit of hostility to the United States which it plainly exhibits, and by the imputation of ulterior and ambitious designs of conquest to the American people which it contains.

III. An examination and discussion of these doctrines.

It is evident from the citations which have been made, that the argument in support of the principal doctrine under review is entirely based upon two assumptions: first, private property upon the land is respected, and it is inconsistent that a different rule should prevail in respect to similar property on the sea; and, second, the present practice is forbidden by natural law, and its abolition is demanded by the interests of humanity, and the sentiments of an advancing civilization. I shall direct my analysis and discussion to these two assumptions, and if they are both found to be false, the whole superstructure of the argument crumbles away.

First, Is private property on land respected in continental wars? Is there any rule of international law, or any practice of civilized states, by virtue of which it is free from capture or destruction? It must be conceded at once that the answer to this question involves only an historical fact, and not a principle of natural law or morality. If it appears that private property on the land is not respected, the inconsistency which is so generally imputed to nations in the conduct of their wars is certainly removed; but we shall not have necessarily proved the abstract right or expediency of the common practice.

Modern theoretical writers upon public law generally assert the doctrine as conceded and the rule as established that private property on land is respected during continental wars. I will not multiply citations: it will suffice to quote from two very recent authors. During our civil war, Dr. Francis Lieber, at the request of Mr. Secretary Stanton, prepared a code of "Instructions for the Armies of the United States while in the Field," which was approved by President Lincoln. The thirty-seventh and thirty-eighth articles are as follows:—

"The United States recognizes and protects private property in enemies' territory. . . . Private property, unless confiscated for the crimes or delicts of the owner, can only be seized for the needs or use of the army or of the United States. If the owner is not in flight, the commanding officer will deliver to him a receipt which will enable him to obtain an indemnity."

Two publicists of the sentimental school thus speak of this work. M. Laboulaye says:—

“These instructions are in fact a little *chef-d'œuvre*. It is not a small thing thus to have installed right in the empire of force by bringing under the yoke of law the usages and even the excesses of war.”

M. Bluntschli declares that it “constitutes one of the most important movements in advance of modern international law,” and was inspired by it to compile the whole body of that law in a codified form. In this work * we find the following articles:—

“The conqueror is bound to respect private property, and can only seize or destroy it when military operations demand such a course.” (§ 652.) “The laws of war especially do not authorize requisitions purely pecuniary.” (§ 654.) “Persons who form part of an army have not the right to seize objects belonging to private individuals or to injure such objects voluntarily. But in case of absolute necessity provisions or clothing may be appropriated; the public treasury (*le fisc*) will nevertheless be bound to reimburse the value of the articles taken, unless the inhabitants were under an obligation to furnish them gratuitously.” (§ 656.) “The international law absolutely interdicts the acquisition of booty in time of war.” (§ 657.)

It is easy in the quiet of one's chamber to construct in this manner a theory which the Prussian Minister appropriately called *douce*; but the theory has no practical value. That certainly cannot be called a rule of the international law which, applying to peoples and governments in the very agony of an armed contest, while each combatant is putting forth its mightiest efforts, and the feelings and passions of individual citizens are aroused to the highest pitch, can only be enforced by an overwhelming hostile power; that cannot be called a rule of the international law for the violation of which no nation was ever called to an account; that cannot be called a rule of the international law which no nation ever feels bound to observe, which no nation ever does observe, except from mere motives of policy, which every nation discards and throws to the winds in practice, whatever may have been the prior professions of its publicists, its statesmen, or its actual rulers. There is in fact no such rule, no such principle, no such doctrine, no such

* Le Droit International Codifié.

practice, that the private property of enemy citizens or subjects on land is to be respected or is respected during continental wars. The very exception which the writers of this school universally make — namely, the exigencies, the necessities of the military movements and operations — utterly destroys the possibility of any rule similar to the one assumed by them; for the sole judge of these exigencies, of these necessities, must either be the commander in the field, or the government whose agent he is, and from the decision of either there can be no appeal, no review. Where all is left to the discretion of a man with an army at his back, and that discretion arbitrary because uncontrolled and uncontrollable except by a more powerful opposing army, it would seem that the rule which the university professors have so neatly constructed can exist only on paper.

Undoubtedly private property is not so systematically taken and confiscated on land as on the sea. For this there are two reasons, — the first found in considerations of policy, and the second in the nature of the element itself. The cruisers of a belligerent freely sail over the sea, meeting no obstacle, except an occasional hostile man-of-war; their course is open; they are invading no enemy soil. In continental wars of the present day an invasion which penetrates the enemy territory to any considerable distance is unusual; the contest generally rages upon the boundaries. The two notable exceptions — the invasion of Georgia and the Carolinas by Sherman, and of France by the Prussians — were in every way remarkable. Of course private property on land is not exposed unless territory is invaded, and is therefore less frequently captured or destroyed than similar property on the sea. But during an invasion private property always has been and is now regarded and treated as completely subject to the victors' will. Whether taken or left, whether destroyed or preserved, depends upon no rule, upon no principle, but simply upon motives of policy. In this connection and upon this point Hautefeuille is very emphatic; and that his position and reasoning may have their full force, it should be remembered that Hautefeuille, more than any other publicist, bases the whole international law upon the law of nature, which he defines to be the precepts and prin-

ciples of God's moral law applicable to the conduct of peoples organized into societies. Mere practice, however universal, mere custom, however hoary with age, has no authority with him, if it be opposed to the immutable principles of right and justice. I cannot, however, quote his argument in even a condensed form. He denies that private property is ever respected by an invading enemy on account of any duty, but only from considerations of expediency, of policy. Lands cannot, of course, be carried away, but houses are occupied, used, destroyed, as the convenience of the army requires. Movables are always at the mercy of the invader, and he generally levies a contribution upon the districts which he traverses, appropriating food of all kinds, clothing, beasts of burden, and often money. When a Bremen deputation waited upon Lord Palmerston to advocate the freedom of belligerent commerce, and made the common assumption that different rules prevailed upon the sea and upon the land, Lord Palmerston, with that strong common sense and regard for fact which made him so hateful to mere theorists, simply replied, that they were mistaken in their premises; that in continental wars private persons were always injured in their property by the lodgement of troops, by contributions, by devastations, and the like, for which they never received any indemnity.

These general statements I will illustrate by two examples which have a peculiar fitness and a dramatic intensity of interest, because the nations implicated were the first to formulate the doctrine of free belligerent commerce in a treaty, and have frequently since that time published it with the assurance of those who believed and practised it,—Prussia and the United States.

In the war of 1866 with Austria, and in that of 1870 with France, Prussia renounced or rather waived the right to capture private enemy property on the sea. If the principle is good on the sea, it certainly ought to be good on the land. We are now told that Prussia leads the civilization of Europe,—we did not know it before,—but her marvellous military power and success sufficiently demonstrated the fact for current American belief. Prussian education is the most perfect system extant; the Prussian army, one would have thought, was an army of

professors and philosophers. Here was certainly an opportunity, full of glorious possibilities, for the sentiments of humanity to express themselves, for the progress of civilization to make itself felt. The free commercial cities which joined the Austrian cause soon discovered from the enormous pecuniary requisitions levied upon them,—the French people, swept through and over by invading hosts, gazing upon sacked villages and slaughtered peasantry, contributing of every species of property which could be demanded and forced from them, and finally crushed down under the burden of an indemnity imposed as a condition of peace,—these Frankforters and Frenchmen discovered that although the sentiments of humanity might have free sweep over the sea, where the Prussians had little commerce and no navy, they had no place on land which could be marched over by victorious Prussian armies.

The United States first reduced the speculative dogma of a free belligerent commerce into a practical form; its first diplomatist procured it to be incorporated into a treaty; President Monroe endeavored to induce the great powers to adopt it; President Pierce demanded it as a condition of uniting in the Declaration of 1856; all these official acts and state papers assert that freedom of property on the sea is but a corollary of the admitted freedom of property on land. If there is one nation in the world which above all others, when engaged in a war, should adhere to its so-called principles of progress and of humanity, that nation is the United States. Our professions have been tested. I pass over all the minor occurrences of the civil war; two events stamp their character upon the whole conflict. General Sherman, with a copy of Dr. Lieber's amiable "Instructions" undoubtedly in his pocket, moved from Atlanta on his march to the sea. Spreading his forces over as wide an extent of territory as possible, he swept down through the richest portions of Georgia, and left behind him a broad track of desolation within which there was nothing but the land, the houses, and the forests; all else was taken or destroyed. Growing crops, the gathered grain and fruits of the soil, the implements of agriculture, the cattle, horses, and other stock,—everything which constituted private movable property vanished in the presence

of his advancing host. On his march from Savannah northward through South Carolina, another and more terrible element of destruction was added. His course was marked by the smoke and flames of burning mansions, until at last the conflagration of beautiful Columbia told with emphasis how the United States government adheres to its time-honored principles, and respects the private property of enemy citizens. With most of these acts I find no fault; I believe that all of them, except the burnings, were actually done in the interests of humanity: but I can't help feeling that Mr. Secretary Stanton snubbed his friend Dr. Lieber, for the history of the times does not tell us that General Sherman gave a single "receipt" which would enable the fortunate possessor "to obtain an indemnity." But all this is trivial: another act of the government deepens its inconsistency into hypocrisy. In former wars property has generally been taken or destroyed by commanders in the field for military purposes, for support of armies, or some similar immediate and pressing need. The United States has done and still does what no other civilized nation in this generation has dared to do: it has confiscated private property in cold blood, without any pretence of military necessity, after all opposition was ended, in pursuance of statutes passed by Congress and approved by the President. The confiscation measures of 1861 and 1862 are still in force. Under them private property of enormous value — amounting, I believe, to hundreds of millions — belonging to enemy subjects or citizens, has been taken and its proceeds appropriated to the use of the government, — "*covered into the treasury*," is the official slang. I need only refer, as an illustration, to the seizure of cotton, after all resistance was ended, when Savannah and other places fell into our hands. In fact, whenever a Southern district was occupied by our forces, it was immediately swept of its cotton by a horde of treasury agents, who swarmed like jackals in the trail of our armies. The validity of these statutes has been disputed, but has been sustained by the Supreme Court in several decisions. The latest is the case of *Miller vs. The United States*, 11 Wallace's R. 248 (1870), which expressly holds that these legislative acts would be utterly void as statutes imposing penalties or punishments for crimes, but are

valid, and valid only, as measures of actual warfare. The opinion is given by Mr. Justice Strong, who may be regarded as representing in a peculiar manner the notions of abstract right and the sentiments of humanity held by the managing portion of the dominant party, and by the present administration. This judgment is so clear, and states the doctrine so boldly, without limitation or exception, that I quote the passage in full. After showing that these measures are not the exercise of the municipal power of the government, are not statutes against crimes, but were passed in virtue of the war powers of Congress, he proceeds at page 305 : —

“ It is argued that though there are no express constitutional restrictions upon the power of Congress to declare and prosecute war or to make rules respecting captures on land or water, there are restrictions implied in the nature of the powers themselves. Hence, it is said, the power to prosecute war is only a power to prosecute it according to the law of nations, and the power to make rules respecting captures is a power to make such rules only as are within the law of nations. Whether this is so or not we do not care to inquire, for it is not necessary to the present case. It is sufficient that the right to confiscate the property of all public enemies is a conceded right. Now what is that right, and why is it allowed ? It may be remarked that it has no reference whatever to the personal guilt of the owner of confiscated property, and the act of confiscation is not a proceeding against him. The confiscation is not because of crime, but because of the relation of the property to the opposing belligerent, a relation in [into] which it has been brought in consequence of its ownership. It is immaterial to it whether the owner be an alien or friend, or even a citizen or subject of the power that attempts to appropriate the property. In either case the property may be liable to confiscation under the rules of war. It is certainly enough to warrant the exercise of this belligerent right, that the owner be a resident of the enemies' country, no matter what his nationality. The whole doctrine of confiscation is built upon the foundation that it is an instrument of coercion, which, by depriving an enemy of property within reach of his power, whether within his territory or without it, impairs his ability to resist the confiscating government, while at the same time it furnishes to that government means for carrying on the war. Hence, any property which the enemy can use, either by actual appropriation or by the exercise of control over its owner, or which the adherents of the enemy have the power of diverting to the enemy's use, is a proper subject of confiscation.”

With this record of recent action, with these existing statutes, with these final judgments, the United States government still prates about freedom from capture on the sea as a doctrine to which the nation is pledged, and in the triumph of which it takes a lively interest. Mr. Secretary Fish congratulates the Prussian Minister upon the act of his royal master at the commencement of the French war, and reminds him of the early day when Prussia and America, first of all states, committed themselves to this philanthropic measure. This spectacle provokes at once derision and disgust, — contempt for the thin, make-believe character of the transaction, disgust for its glaring hypocrisy. Our public acts belie our public professions, while our professions cast a slur upon our acts.

I need pursue this branch of the subject no further. It is plain that there is no rule of international law, no practice of civilized states, which exempts private enemy property from capture or destruction on land.

Second, are these new doctrines in the interest of humanity and of civilization ?

The argument generally advanced by their advocates consists of bald assumptions and frothy declamation. The assumption is of the very foundation upon which the proposed reform must rest, namely, that it is in the interest of humanity, that interference with private property in war is contrary to natural law ; that is, contrary to the precepts of God's moral law applicable to organized bodies politic. Most of the writers to whom I have referred in this essay content themselves with asserting the proposition, without any attempt to demonstrate its truth, or any apparent consciousness that a demonstration is necessary. I have, however, already mentioned one exception, M. Massé, and will quote his argument in full, because it is clear, condensed, and in form logical. He says : —

“ War ought to be just in its consequences ; that is to say, it ought to be conducted in conformity with the eternal laws of humanity and of justice, and ought not to be the means of obtaining more than is due, nor of obtaining anything different from what is due, either as the cause of the war or the title to reparation. *Inter arma silent leges*, says Grotius ; but only those civil and juridical laws which have place solely in time of peace, and not these perpetual laws which are for all times.

Now, since the laws of humanity and of justice are laws for all times, whose voice war cannot stifle, it follows that if the very nature of war itself, and the condition of reciprocal violence into which the belligerents are thrown, authorize them to do to the *enemy* as much evil as is necessary to force him to be just, or to obtain the reparation which is due from him, they do not authorize anything beyond this ; they authorize evil to be done solely to the *enemy* because it is the enemy, and the *enemy alone*, which the belligerent has any interest in forcing to be just. And as the right of war is based upon a necessity imposed upon one people to do violence to another people, both taken and regarded *collectively*, it results that war is a relation of *state to state*, and not of *individuals to individuals*, a relation of things and not of persons ; in such a sense and manner that between two or more belligerent nations, the particular individuals of which these nations are composed are not *enemies*, whether we consider them as men or as citizens, and they become enemies only when they act in the name of and as representatives of the state or nation ; that is to say, when they are soldiers, or when they personally engage in acts of hostility. It follows from this principle, that belligerents have no right either to inflict injury upon citizens of the state with which the war exists, unless these citizens have taken arms and have individually put on the character of enemies, or to obtain satisfaction, or to reclaim what is due either as the cause of or as reparation for the war, from such citizens, or to disturb the pacific and commercial relations which have no connection with the condition of war, which, by introducing enmity between two or more states, has not introduced enmity between the men who compose them." *

I am now prepared to examine this fundamental position which the advocates of the proposed change assume, and I deny its correctness. I deny that the principles and precepts of natural law, of that divine moral code which has been invoked, forbid the taking or destruction of private property in war. I affirm that the doctrine which so many modern publicists seek to establish is opposed to the interests of humanity, that its adoption would be a step in the retrograde, and that its necessary and intended effect would be to uphold mere physical force, to sustain absolutism.

It will not of course be denied that the destruction of a nation's foreign commerce would greatly cripple the nation itself, would weaken all its energies, would cut off many of its re-

* Massé, Le Droit Commercial, Tom. I. pp. 104, 105, §§ 120, 121.

sources, would largely diminish its power of resistance and of attack. This result is especially true in time of war, because a great body of producers are then withdrawn from the acts and processes of production, and the want created by this withdrawal must be supplied from abroad, or cannot be supplied at all. I need not dwell upon this preliminary proposition. All must admit that if the foreign commerce of one belligerent has been destroyed, much has been accomplished tending to a successful termination of the conflict. Now it should be carefully observed, in this connection, that in destroying the entire foreign commerce, it would not be necessary actually to seize and confiscate all of the merchant ships and cargoes of the enemy citizens; in fact, a very few, compared with the whole number, would be taken. The process is as follows: A war breaks out between two states, both maritime. A few weeks or months will decide which has the mastery on the sea. During this short interval, a number of the trading ships and cargoes — but in fact a small number — belonging to the subjects of the other belligerent will be seized, and then, learning their country's weakness, these trading citizens will simply suspend their further traffic; they will sell to neutrals what vessels and cargoes they have afloat, and will await the return of peace. Destruction of commerce, therefore, does not imply much destruction of actual property; it rather implies a forced suspension of trade, a cessation of the pleasant process of making profits, a loss of future expectations rather than of present possessions. All this, which is so true, so self-evident, is overlooked in the writings of the school whose teachings I oppose. This very cessation of commerce works all the injury to the state which the exigencies of successful war demand, without very much loss to individuals of property on hand. The experience of our civil war furnishes a very striking illustration. The few Rebel cruisers, by driving our trade from the ocean, inflicted a blow upon the country more staggering than that given by the defeat of many armies; and how few ships were actually captured! For every one taken I presume twenty-five or perhaps more were transferred to foreign owners.

There is still another preliminary fact which it is important to notice. Destruction of private property inflicts no *perma-*

nent injury ; and what is true of the countless forms of wealth on land is *a fortiori* true of the instruments and objects of commerce on the sea. Even if all the accumulated results of labor were swept out of existence, and only the fertile land and the able-bodied inhabitants were left, the short time within which the nation would recuperate is something simply marvellous. Destroying men destroys producers and lessens the power of producing. Destroying private property is but the removing a small part of the surplus products, and the energies of a vigorous people will soon supply the waste.

War is in some aspects a dreadful evil, but it is necessary and will continue to be necessary as long as states are independent and have no common earthly authority to which they may appeal and whose decision they must respect. It cannot then be a wrong *absolutely*. The order of things as established by the Creator involves the existence of wars. We cannot apply to nations at any time, and especially in time of war, the same principles and precepts of personal morality which regulate the conduct of the individual men who compose those nations ; because if we do so attempt to apply them, we must begin by interdicting all wars. The state in its organic capacity — although I conceive and affirm that it has a moral character, moral relations, rights, and duties — cannot be governed by the same rules and motives of action as those which compel individuals. The state is a trustee for its own citizens ; its primary duty is towards them, to promote their security and well-being. Its duties to other states and the citizens thereof are subordinate to its duties to its own subjects. It may therefore well be that these two classes of duties should clash ; and when so, it is plain which must yield. These general principles, which cannot be denied, throw light upon the absolute morality of state action towards foreign states or citizens which are for the time enemies.

The object of war is to produce a peace in the shortest possible time. In every scientific discussion we must throw out of view all motives of revenge or of doing injury for injury's sake. Each belligerent state has some ultimate end, the attainment of which requires and is assumed to justify a resort to arms. The object of the war is to reach as soon as possible

consistent with and in connection with the attainment of this end the normal condition of the parties, to restore the peaceful relations which have been interrupted. M. Hautefeuille bases his whole argument in favor of the existing practices of nations in reference to private property upon the fact that destruction of material wealth tends to hasten the close of hostilities, and thus to accomplish their very design as well as the killing and wounding human beings. The argument is fair and forcible, but I think there are others much stronger.

It is in accordance with the principles and precepts of natural law, with the sentiments of humanity, and with the interests of Christian civilization, to produce a peace not only as soon as possible, but with as little destruction of human life, with as little injury to human bodies, as possible. For this reason the improvements in weapons of offensive warfare — the rifled guns, the enormous shells, the dreaded torpedoes — are humane inventions, because they make wars on the whole less bloody. If science should so far perfect the instruments of slaughter that every member of each opposing army would with absolute certainty be killed at a blow, then wars would cease. If this be true, the conclusion is inevitable, that it is more in accordance with the instincts of humanity to inflict injury upon an enemy state, and thus to force a peace, by capturing or destroying property, than to reach the same result by killing and maiming men. *A fortiori* must this be true if the capture or destruction is not of articles necessary to the immediate subsistence and preservation of the enemy inhabitants, but is rather of superfluities, of things which are at most comforts and conveniences, and finally if the loss be one from which the nation will in a short time recover. The ideal of a war carried on according to mere motives of humanity, of a war in which sentiments of humanity have absolute control, would be one where no injury was done to human beings, no life taken, no wound inflicted, and all the force was exerted against material objects.

The new doctrines are evidently the exact opposite of this ideal; they exalt wealth above humanity; they make loss of products a greater evil than loss of producers; they demand that all the forces of war should be directed exclusively against

men, against life, bodies, and limbs. It is true they would confine the use of these hostile forces to one class of men, to combatants or soldiers. We can now see how false are the assumptions, how hollow the pretences, of the sentimental school of publicists. They regard soldiers or combatants as mere machines, ignoring their humanity, and placing them in importance below the material wealth of citizens who stay at home and trade. When we are about to test the rules and practices of war by the instincts and sentiments of humanity merely, we should remember that the professional soldier is as much a human being as the merchant, that his life is as valuable as that of the artisan, and that when we compare him with ships and cargoes there is no common measure which can be applied to them. What is true when we think of professional soldiers, of combatants who are as a class separated from all other classes, is most overwhelmingly true of modern wars where the armies are drawn from the great body of the citizens, where all ranks and classes, producers of every kind, are marched into the field and become the combatants, while behind them stands the rest of the nation awaiting its turn to join in the conflict.

If the doctrines I am examining should be universally adopted, the consequence would be immediate and inevitable; all wars would be made more protracted, and, what is far worse, more bloody. This proposition can be well illustrated by assuming the accomplishment of the proposed change, the realization of the ideal which the reformers have conceived; that is, contest between combatants alone, while all else in the state goes on as usual. A war is declared between two powerful maritime nations. It produces no direct change in the peaceful avocations of life; agriculture, manufactures, commerce, flourish as before. The people are not hindered in their productions and exchanges, and are thus enabled to respond to the demands of the government, and to furnish all the material supplies necessary to sustain the struggle. It is true that producers are withdrawn from time to time from the orderly activities of life, and are converted into military non-producers. But the vacancy thus made is not felt, because the articles which were before produced at home are now brought from abroad by means of the

free commerce which is thus quickened into extraordinary activity. Under these circumstances the war is reduced to a mere duel between hostile armies. The nation has only to furnish men, and the contest will be continued until one country has been swept of its able-bodied citizens. That nation will certainly be victorious which can bring forward and sacrifice the greatest number of soldiers. This is not an imaginary picture. The essential fact was shown to be true in the history of the Confederacy. Levy after levy was made, army after army took the field ; but as soon as Sherman ravaged the sources of supply in Georgia and Carolina, the whole hostile array collapsed.

Finally, all this, when accomplished, would evidently be in the interests of absolutism. Under the influence and effect of these doctrines, nations to be great, and powerful, and successful in war, must maintain enormous standing armies, or must rather, as Prussia has done, convert the entire mass of citizens into an army ready to be summoned into active service. The picture of a war waged between combatants alone, which I have just drawn, shows that success requires vast numbers and constant training ; and this means vast professional armies or universal military organization of citizens ; and this in turn means, *is, absolutism*, is utterly incompatible with constitutional government. The insane admiration for the Prussian system as something good in itself, as well as something wonderful in its power, which was felt and outspoken all through the United States during the Franco-Prussian war, indicated a demoralization alarming to every thoughtful citizen, — a forgetting of the very principles of a free government and of civil liberty.

Furthermore, these dominating nations would be continental ; maritime power and supremacy would be gone. Navies would be useless, except to attack and defend coast towns and fortifications. The peoples most favorably situated for maintaining the mastery of the sea would be obliged to become strong on land or sink into the rank of inferior powers. The two nations of all others which would thus be deprived of their natural advantages and maritime supremacy are the United States and Great Britain.

That I am not mistaken in these positions is plain from the unconcealed partisanship of the Second as well as of the First

Empire, exhibited by the French writers whose names I have given. M. Cauchy repeatedly refers to Napoleon I. as an authority; and quotes a declaration made by him, in 1809, to Mr. **Armstrong**, Minister of the United States, as follows:—

“The seas belong to no nation; they are the common good of the peoples, and the domain of all. Enemy ships of commerce, belonging to private individuals, ought to be respected. In all her conquests, France has respected private property. . . . Such are the principles of the Emperor upon the usages and the rights of maritime warfares. When France shall have acquired a navy proportioned to the extent of her coasts and of her population, the Emperor will reduce these maxims to practice, and will use all his efforts to render their adoption general.” *

Napoleon’s design in this is as plain as his lying was audacious. The man who openly violated and derided all rules of international law, whose principle of actual war was to support his army from off the enemy, who respected neither the persons nor property of enemy citizens, wished to destroy the power of Great Britain by rendering navies useless, and armies the sole instrument of warfare.

There is a further consideration of policy which applies with peculiar force to the United States. Notwithstanding the episode of our civil war, we are and must ever be the great neutral nation of the world. Down to the year 1861 it was our traditional policy to uphold and maintain neutral rights; all the world looked to us as the champion of these rights. Erelong, when the government falls once more into the hands of statesmen, this policy will be revived. The Treaty of Paris of 1856 was a triumph of the neutral cause; it fixed what had been contended for through generations,—the doctrine that free ships make free goods; or, in other words, that neutral vessels may carry enemy goods free from capture. With these rules of 1856 in existence, the next great European war and all succeeding ones will throw into our hands the carrying trade of the world, the commerce of both continents. But if this commerce be made free for the belligerents themselves, all these advantages are lost, sacrificed to a mere sentiment. The advocacy of free belligerent commerce by Americans is therefore simply suicidal.

* *Droit Maritime International*, p. 561.

My time and space do not allow me to speak at length of the other proposed change in the laws of war. It is in the same interest and designed to promote the same objects as the one I have discussed. If the time shall ever arrive when all mastery on the sea is ended, when a few great continental powers dominate in the family of nations by their enormous armies and organized military citizens, and when no aid can be given in arms, ammunition, and other warlike material to a weak and struggling people, there will be a triumph indeed, but not of civilization, not of humanity.

JOHN NORTON POMEROY.